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(2) Affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and

(3) A statement that such new matter could not have been discovered by the exercise of due diligence prior to the date the case was submitted to the Board.

[40 FR 30243, July 17, 1975, as amended at 49 FR 28250, July 11, 1984, 59 FR 59050, Nov. 15, 1994]

Subpart J—Ex Parte Communications

AUTHORITY: Sec. 4, Government in the Sunshine Act, Pub. L. 94-409, amending 5 U.S.C. 556(d) and 5 U.S.C. 557; Title VI, Federal Aviation Act of 1958, as amended, 49 U.S.C. 1421 et seq.; Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2166 (49 U.S.C. 1901 et seq.).

SOURCE: 42 FR 21613, Apr. 28, 1977, unless otherwise noted.

§ 821.60 Definitions.

As used in this subpart:

Board decisional employee means a Board Member, administrative law judge, or other employee who is or who may reasonably be expected to be involved in the decisional process of the proceeding;

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this part.

§ 821.61 Prohibited ex parte communications.

(a) The prohibitions of this section shall apply from the time a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply at the time of the acquisition of such knowledge.

(b) Except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the Board shall make or knowingly cause to be made to any Board employee an

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ex parte communication relevant to the merits of the proceeding;

(2) No Board employee shall make or knowingly cause to be made to any interested person outside the Board an ex parte communication relevant to the merits of the proceeding.

Ex parte communications regarding solely matters of board procedure or practice are not prohibited by this section.

§ 821.62 Procedures for handling ex parte communication.

A Board employee who receives or who makes or knowingly causes to be made a communication prohibited by § 821.61 shall place on the public record of the proceeding:

- (a) All such written communications;
- (b) Memoranda stating the substance of all such oral communications; and
- (c) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (a) and (b) of this section.

§ 821.63 Requirement to show cause and imposition of sanction.

(a) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of § 821.61, the Board, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) The Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes it administers, consider a violation of this subpart sufficient grounds for a decision adverse to a party who has knowingly committed or knowingly caused a violation to occur. Alternatively, the Board may impose sanction, including suspension of the privilege of practice before the Board, on the party's attorney or representative, where an infraction has been committed by that attorney or representative

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and penalizing the party represented is not in the interest of justice.

[42 FR 21613, Apr. 28, 1977, as amended at 59 FR 59050, Nov. 15, 1994]

Subpart K—Judicial Review of Board Orders

§ 821.64 Judicial review.

(a) *General.* Judicial review of a final order of the Board may be sought as provided in section 1006 of the Act (49 U.S.C. 46110) and section 304(d) of the Independent Safety Board Act of 1974 (49 U.S.C. 1153) by filing a petition for review with the appropriate United States court of appeals within 60 days of the date of entry (service date) of the Board's order. Under the Federal Aviation Act, as amended, any party may appeal the Board's decision. The Board itself does not typically participate in the judicial review of its action. In matters appealed by the FAA, respondents should anticipate the need to make their own defense.

(b) *Stay pending judicial review.* No petition for stay pending judicial review will be entertained if it is received by the Board after the effective date of the Board's order. If a stay action is to be timely, any petition must be filed sufficiently in advance of the effective date of the Board's order to allow for the possibility of a reply and to allow for Board review.

[59 FR 59050, Nov. 15, 1994]

PART 825—RULES OF PROCEDURE FOR MERCHANT MARINE APPEALS FROM DECISIONS OF THE COMMANDANT, U.S. COAST GUARD

Sec.

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AUTHORITY: Sec. 304(a)(9)(B), Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2169 (49 U.S.C. 1903(a)(9)(B)).

SOURCE: 40 FR 30248, July 17, 1975, unless otherwise noted.

§ 825.1 Applicability.

The provisions of this part govern all proceedings before the National Transportation Safety Board (Board) on appeals taken from decisions, on or after April 1, 1975, of the Commandant, U.S. Coast Guard, sustaining orders of an administrative law judge, revoking, suspending, or denying a license, certificate, document, or register in proceedings under:

(a) R.S. 4450, as amended (46 U.S.C. 239);

(b) Act of July 15, 1954 (46 U.S.C. 239a-b); or

(c) Section 4, Great Lakes Pilotage Act (46 U.S.C. 216(b)).

§ 825.5 Notice of appeal.

(a) A party may appeal from the Commandant's decision sustaining an order of revocation, suspension, or denial of a license, certificate, document, or register in proceedings described in § 825.1, by filing a notice of appeal with the Board within 10 days after service of the Commandant's decision upon the party or his designated attorney. Upon good cause shown, the time for filing may be extended.

(b) Notice of appeal shall be addressed to the Docket Clerk, National Transportation Safety Board, Washington, DC 20594. At the same time, a copy shall be served on the Commandant (GL), U.S. Coast Guard, Washington, DC 20590.

(c) The notice of appeal shall state the name of the party, the number of the Commandant's decision, and, in brief, the grounds for the appeal.

§ 825.10 Referral of record.

Upon receipt of a notice of appeal, the Commandant shall immediately transmit to the Board the complete record of the hearing upon which his decision was based. This includes the charges, the transcript of testimony, and hearing proceedings (including exhibits), briefs filed by the party, the decision of the administrative law judge, and the Commandant's decision on appeal. It does not include intra-agency staff memoranda provided as advice to the Commandant to aid in his decision.